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No. 84-1078

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN CARSON,
STUART KEANE, and
MOTEL RESORTS, LTD., Petitioners,

v.

STATE OF INDIANA,
INDIANA STATE POLICE DEPARTMENT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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QUESTIONS PRESENTED FOR REVIEW

Whether the State of Indiana and its State Police Department violated Amendment Fourteen, Sec. 1, of the Constitution of the United States, in seizing and depriving the Petitioners of their personal property without the bringing, filing or proving of any criminal violations; and whether the statute of the State of Indiana, I.C. 35-1-6-5.1(c) as interpreted to permit the holding and destruction of that property without any trial whatsoever, is in violation of the said Amendment Fourteen, Sec. 1, of the Constitution Of The United States.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

John Carson, Stuart Keane, and Motel Resorts, Ltd., the Petitioners herein, pray that a writ of certiorari issue to review the judgment of the Supreme Court Of Indiana entered in the above-entitled case on April 17, 1984.

OPINIONS BELOW

The opinion of the Court Of Appeals of The State Of Indiana, (Appendix A, infra, pp. A-1-) was entered on November 23, 1983, and the docket entry of the decision, April 17, 1984, of the Supreme Court Of Indiana, denying transfer, was as follows:

> "Appellants' petition to Transfer is hereby Denied. Givan, C.J. All Justices Concur, except Hunter, J., who votes to Grant."

The decision of the lower Court, the Clark County Court, from which the appeal was taken, was as follows:

> "O R D E R
>
> "Comes now the Court and having heard the evidence presented, arguments of counsel and the briefs presented herein and having taken said Motion under advisement, now finds that the Petitioner's Motion For Return Of Property should be and the same is hereby denied.
>
> "IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the Petitioner's Motion For Return Of Property should be and the same is hereby denied.
>
> "SO ORDERED THIS 27th DAY OF SEPTEMBER, 1982."

JURISDICTION

The judgment of the Court Of Appeals of Indiana, (Appendix A, infra, pp. was entered on November 23, 1983. A timely petition for rehearing was denied on January 4, 1984, by that Court, and a timely Petition To Transfer was duly filed with the Supreme Court Of Indiana on January 24, 1984, and denied by that Court on April 17, 1984. The jurisdiction of the Supreme Court is invoked under 28 USC sec. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws."

This case further involves the following statutes in the State of Indiana:

I.C. 35-1-6-5.1 (now recodified as I.C. 35-33-5-5)

***

"(b) Evidence that consists of property obtained unlawfully from its owner may be returned by the law enforcement agency to the owner before trial, in accordance with IC 35-43-4-4(h), if that property may be lawfully possessed by the owner.

"(c) Following the final disposition of the cause at trial level or any other final disposition:

"(1) Property which may be lawfully possessed shall be returned to its rightfull owner, if known. If ownership is unknown, a reasonable attempt shall be made by the law enforcement agency holding the property to ascertain ownership of the property. After ninety (90) days from the time: (i) the rightful owner has been notified to take possession of the property; or (ii) a reasonable effort has been made to ascertain ownership of the property, the law enforcement agency holding the property shall, at such time as it is convenient, dispose of this property at a public auction. The proceedings of this property shall be paid into the county general fund.

"(2) Property, the possession of which is unlawful, shall be destroyed

by the law enforcement agency holding it sixty (60) days after final disposition of the cause.

"(3) All other property shall be disposed of by the law enforcement agency holding it sixty (60) days after final disposition of the cause, by sale as provided in subsection (c)(1), destruction or any other disposition.

"(d) If any property described in subsection (c)(1), (c)(2) or (c)(3) was admitted into evidence in the cause, any disposition of the property shall be based upon an order of the court trying the cause."

I.C. 35-33-5-5.1 (Indiana Code, (1983 Supp.), effective Sept. 1, 1983

"Notwithstanding section 5(35-33-5-5) of this chapter, if:

"(1) Property alleged to be a gambling device:

"(A) Was seized by a law enforcement agency; and

"(B) Has been in the custody of a law enforcment agency for more than one year;

"(2) No criminal charges have been filed for which the property is necessary as evidence; and

"(3) The owner of the property requests in writing that it be returned; the property shall be promptly returned to the owner."

STATEMENT OF THE CASE

The personal property in question, electronics equipment, had been seized on December 14, 1981, under a search warrant issued by the Clark County Court. At the time the motion for the return of the property was filed, on April 7, 1982, there had been no criminal or civil proceedings filed in respect thereto against anyone. In response to the motion for the return of the property, (in which the State Police Department acknowledged that it had seized theproperty, known as the "Kentucky Derby Racing Machine" and had refused to return it), the Department noted that the prosecuting attorney had declined to initiate criminal charges, but further contended that "The current status of any criminal action would seem to be nonexistent until any change in the office of the prosecutor", and that "the threat of possible criminal prosecution may exist until the relevant statute of limitations expires." The Department

further contended that the proper remedy should have been in replevin, and that the Court could not order the return of the machine because there has not been a "final disposition" -- that the refusal to bring charges is not a final disposition, and that until the Court could find that a final disposition had occured, the Court could not order the return of the property. (R., 68-74)

As noted above, the disposition of the motion for return of the property was simply a denial of the motion. In its affirmance of the Clark County Court, the Court Of Appeals Of Indiana has ignored the exact nature of the ruling of the lower Court, has ignored the contention of the Respondents that the motion for return of the property was premature, and purported to make its own findings of fact, which the lower Court did not make. The decision of the Supreme Court Of Indiana, by divided Court, was simply to deny transfer. (Undersigned counsel

has been informed by counsel for the State of Indiana and the Indiana State Police Department that they have proceeded to destroy the property.)

The property, the Kentucky Derby Machine, was played with tokens purchased for twenty-five cents (25¢) which could not be exchanged for money and had no intrinsic value, and the machine moved horses across the track, and disbursed tokens. The only use for the tokens was playing the machine and purchasing food at the Marriott Inn in Clarksv ille, Ind. (Not only was there no exchange permitted for money, but the patron had to pay his own sales tax separately. The machine was utilized by the Marriott Inn as an entertainment device. (R., 157-176) Contrary to the statement of the Court Of Appeals Of Indiana in its opinion, the question of violation of the Fourteenth Amendment Of The Constitution Of The United States by the Respondents and by said statute, as interpreted,

was raised and presented by the Petitioners, as set out in their Brief at pp. 46-51.

REASONS FOR GRANTING WRIT (ARGUMENT)

Petitioners respectfully submit that the particular circumstances appear to present a matter of first impression, the combined action of the Court Of Appeals Of Indiana and the Supreme Court Of Indiana has by default (in that said Courts decoined to rule on the Constitutional questions on the erroneous ground that it had not been argued) decided an important question of federal law which should be settled by this Court.

It is to be noted that the subject property was not a specifically defined gambling device unlawful to possess, and that no criminal prosecutions whatsoever were either filed or tried, and that at no point did the State of Indiana or the Indiana State Police Department attempt to contend that the property was being retained because of some ongoing inves-

tigation or an emergency. With no prosecution of any kind being made, so that there would be a final disposition of the cause in which the property was seized, there is no provision whatsoever in the said statute, supra, I.C. 35-1-6-5.1, for a hearing in which the owners can be notified and have an opportunity to be heard, with a judicial decision being made thereon as to destruction of the property. It is respectfully submitted that the long and indefinite withholding of the property without the bringing of any charges nor holding of any hearing, (and the destruction thereof after such indefinite holding, with no hearing and no Court order), is a clear denial of due process in violation of the Fourteenth Amendment, sec. 1, of the Constitution Of The United States, and that the said statute interpreted to authorize such action is likewise in violation of the same Constitutional provision.

State v. Derry, (1908), 171 Ind. 18, 85 N.E. 765, 768

These citizens'(Petitioners)rights depended on ascertainment of facts, but the valuable property was held and then destroyed without a hearing and opportunity to be heard in respect thereto by the Court deciding those facts.

Roberts v. Anderson, C.C.A. Okl., 66 F. 2d 874

Truax v. Corrigan, Ariz., 42 S.Ct. 124, 257 U.S. 312, 66 L.Ed. 254, 27 A.L.R. 375

People v. Duffy, 179 P. 2d 876, 79 Cal. App. 2d Supp. 875

As noted by the Court Of Appeals Of Indiana, the General Assembly of Indiana has dealt with the question in another subsequent statute, IC 35-33-5-5.1, which has been in effect since September 1, 1983, providing in relevant part that notwithstanding any other provision,

"if:

"(1) property alleged to be a gambling device:

"(A) was seized by a law enforcement agency; and

"(B) has been in custody of the law enforcement agency for more than one (1) year;

"(2) no criminal charges have been

filed for which the property is necessary as evidence; and

"(3) the owner of the property requests in writing that it be returned;

the property must be promptly returned to the owner."

Yet the State of Indiana of Indiana and the Indiana State Police Department have continued to ignore the rights of the Petitioners without pursuing any charges whatsoever.

CONCLUSION

For the foregoing reasons this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

"IN THE MATTER OF THE SEARCH AND SEIZURE OF PROPERTY LOCATED AT THE MARRIOTT INN, 505 MARRIOTT DRIVE, CLARKSVILLE, INDIANA. Pursuant to an Affidavit for Search Warrant Signed by Charles E. Jerrell and Pursuant to the Warrant Issued by this Court on December 14, 1981.

John CARSON, Stuart Keane, Motel Resorts, Ltd., Petitioners-Appellants,

v.

STATE of Indiana, Indiana State Police Department, Respondents-Appellees.

No. 1-483A108

Court Of Appeals Of Indiana, First District.

Nov. 23, 1983.

RATLIFF, Judge.

STATEMENT OF THE CASE

"The Petitioners-appellants, John Carson, Stuart Keane, and Motel Resorts, Ltd. (petitioners), appeal from a Clark County Court judgment denying their motion for the return of certain property seized by the Indiana State Police pursuant to a search warrant. We affirm.

FACTS

"In 1979, Motel Resorts, Ltd., Owners

and operators of the Marriott Inn in Clarksville, Indiana, arranged to lease a Kentucky Derby Machine from John Carson and Stuart Keane for use in the Inn's Churchill Downs lounge. As described by the petitioners, the machine consists of nine mechanical horses which race across a track when activated by a token. If the horse chosen by the player wins the race, the lucky patron receives additional tokens in accordance with the odds displayed by the machine for that particular race. The tokens, which could be purchased for 25 cents a piece, were redeemable for food in either of the Inn's two restaurants. They could not be redeemed for cash or liquor, however, and winning patrons were required to pay any sales tax in case.

"On December 14, 1981, the Clark County Court issued a warrant for a search of the Marriott Inn. This warrant was premised upon an affidavit filed by the Indiana State Police which stated, inter alia:

"that the above described items (the machine and other related paraphernalia) are unlawfully possessed and subject to seizure because they are used in an illegal gambling operation contrary to IC 35-45-5-3." Record at 129. Following the machine's seizure, however, no criminal charges were brought against Carson, Keane, Motel Resorts, Ltd., or the Marriott Inn, prompting the parties to file a motion for its return.

"At an August 20, 1982, hearing on the Petitioners' motion, attorney Thomas J. Kough of the Indiana State Police appeared on behalf of the state in opposition to the motion. The petitioners' motion was denied on September 27, 1982.

"Additional facts are stated in our discussion of the issues.

ISSUES

"The petitioners present five issues for our review which we believe may be adequately restated as follows:

"1. Did the trial court err by allowing attorney Kough to appeal on behalf of the

state in opposition to the petitioners' motion?

"2. Did the trial court err by denying the petitioners' motion for return of the machine?

DISCUSSION AND DECISION

"Issue One

"(1) The petitioners' initial argument challenges the appearance of attorney Kough on behalf of the state. Because Kough was neither a deputy attorney general nor a county prosecutor, the petitioners submit his representation of the state was improper. This position, however, is wholly without merit.

"Apparently, the petitioners have chosen to ignor both ruling precedent, Banta v. Clark, (1979) Ind. App., 398 N.E. 2d 692, and the provisions of Indiana Code section 4-6-5-3 (1982 Repl.)

"The latter states:

> 'No agency, except as provided in this act (4-6-5-6), shall have any right to name, appoint, employ or

> hire any attorney, or special or general counsel to represent it or perform any legal service in behalf of such agency and the state without the written consent of the attorney general."

Id. (emphasis supplied).

"In the instant case, written consent was given by the attorney general. This is all that the statute required. Banta, 398 N.E. 2d at 693. While the attorney general 'has exclusive power and right in most instances to represent the State, its agencies and officers...(i)f he consents in writing the agency may employ another attorney." Id.

"The statute was clearly adhered to in the instant case. Therefore, Kough's representation of the state was proper.

Issue Two

"The petitioners next challenge the trial court's refusal to return the machine. This refusal, in their view, constituted not only an abuse of discretion, but was con-

trary to both the evidence and applicable law. [1] We cannot agree.

"The warrant authorizing the search of the Inn and seizure of the machine was premised upon an affidavit filed by the Indiana State Police. Referring specifically to the machine, the affidavit stated it was being used 'in an illegal gambling operation contrary to IC 35-45-5-3.' Record at 129. Although the petitioners argue the machine was not a gambling device, and that they did not 'knowingly and intentionally' operate it, review of the applicable statutes and the record leads us to a contrary conclusion.

"The term 'gambling device' is defined in pertinent part as:

> "(1) A mechanism by operation of which a right to money or other property may be credited in return for consideration, as the result of the operation of an element of chance;

[1] The petitioners do not allege any denial of due process in the underlying procee-

"(2) A mechanism that, when operated for a consideration, does not return the same value or property for the same consideration upon each operation;

"(3) A mechanism, furniture, fixture, construction, or installation designed primarily for use in connection with professional gambling...'

"Indiana Code section 35-45-5-1 (1979 Repl.) (emphasis supplied).

"With regard to 'professional gambling,' Indiana Code section 35-45-3(6_) (1979 Repl.), provides it may consist of '(a) person who knowingly or intentionally: accepts money or other property risked in gambling.' Id.

"(2,3) In the instant case, not only does the machine come within the definition of gambling devices, butmore importantly, we believe its use by the petitioners clearly falls within the meaning of professional gambling. By choosing a horse and acti-

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dings; we thus presume due process was satisfied.

vating the machine, patrons were playing a game of chance in which they could win a sum of tokens in accordance with the odds displayed by the machine. True, players could not win money, but to say the winning tokens did not represent 'other property,' Indiana Code section 35-45-5-1(1) is to ignore both common sense and the plain meaning of the statute. The same can be said of the petitioners' argument that their operation of the machine did not constitute professional gambling. Clearly, the only conceivable use of the machine was to accept, for profit, tokens risked in a game of change. Ind. Code s 35-45-5-3(6) (1979 Repl.).

"(4) Moreover, we find no merit whatsoever in the petitioners' argument that their operation of the machine was not a knowing or intentional act. The petitioners not only consulted with law enforcement officials prior to its installation, at which time they revealed their intentions, but additionally, they revealed

at the hearing, through Carson's testimony, the manner in which the machine was operated; its operation being in contravention of our gambling laws.

"(5) Nor can the petitioners justify their conduct on the grounds certain law enforcement officials assured them that operation of the machine would not result in criminal prosecution. First, the petitioners were never told the operation of the machine did not violate state gambling laws. Rather, the essence of the assurances was that use of the machine would be an acceptable level of gambling in the community. More importantly, however, it is not the office of any law enforcement official to grant citizens a license to violate the law. To suggest such a licensing scheme exists is absurd.

"Having disposed of these collateral issues we turn now to the essential issue raised by the facts of this case: was the trial court correct in refusing to return the machine.[2] Applicable to this discussion

[2] On September 1, 1983, Indiana Code sec-

are the provisions of Indiana Code section 35-1-6-5.1 [3] (1980). In pertinent part this section states:

> "Disposition of Property Held as Evidence. (a) All items of property seized by any law enforcement agency pursuant to an arrest, search warrant or warrantless search shall be securely held by the law enforcement agency under the order of the court trying the cause except as provided in this section...
>
> "(c) Following the final disposition of the cause at trial level or any other final disposition:

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tion 35-33-5-5.1 (1983 Supp.), became effective. It provides:

> 'Notwithstanding section 5(35-33-5-5) of this chapter, if:
>
> (1) Property alleged to be a gambling device:
>
> (A) Was seized by a law enforcement agency; and
>
> (B) Has been in the custody of a

(1) Property which may be lawfully possessed shall be returned to its rightful owner, if known...

(2) Property, the possession of which is unlawful, shall be destroyed by the law enforcement agency holding it sixty (60) days after final disposition of the cause...

"(f) The law enforcement agency disposing of the property in any manner provided in subsections (b) and (c) of this section shall maintain certified records of any such disposition. Disposition by destruction of property, the possession of which is unlawful, shall be witnessed by two (2) persons who shall attest to the destruction."

Id.

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law enforcement agency for more than one year;

(2) No criminal charges have been filed for which the property is necessary as evidence; and

(3) The owner of the property requests

"(6) The petitioners contend this section, subsection (c)(1) specifically authorizes the return of their machine. They have, however, misconstrued the statute. The return of seized property under the statute is permitted only when the item may be "lawfully possessed." Because the Kentucky Derby Machine constitutes a gambling device and was used for purposes of professional gambling, its possession is clearly unlawful. Accordingly, subsection (c)(2) provides that it may be retained by law enforcement officials and destroyed 60 days after final disposition of the cause. The trial court's determination that the machine could not be returned was therefore correct and must be affirmed.

"Affirmed.

"ROBERTSON, P.J., and NEAL J., concur."

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in writing that it be returned; the property shall be promptly returned to the owner."

"The proceedings in the present case were initiated well before the effective

date of this statute and thus it is of no improt here. Whether it would be applicable in any future proceedings following disposition of this appeal is a question we need not address at this time. Accordingly, we express no opinion as to its possible applicability.

[3] This section was repealed effective September 1, 1982. For present law see Indiana Code section 35-33-5-5(1983 Supp.).